Supreme Court, U.S.
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No. 94-1381

In The

Supreme Court of the United States

OCTOBER TERM, 1994

DAVIDSON BROS, INC., a New Jersey Corporation,
Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation;
CITY OF NEW BRUNSWICK, a Municipal Corporation;
C-TOWN, a Division of Krasdale Foods, Inc., and
NEW BRUNSWICK HOUSING AUTHORITY,
a Body Corporate and Politic,
Respondents

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONER'S REPLY MEMORANDUM

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It is not surprising that in light of the difficult and significant takings issue raised by the determinations of the New Jersey courts below, effectively declaring a recognized private property right null and void solely because that private property right interfered with some public purpose, Respondents' primary response to the present Petition is to raise purely procedural arguments in order to make it appear that the takings issue was not raised in the state courts, or, alternatively, that the determinations of the state courts rested upon adequate non-federal grounds concerning state property law. Neither assertion, however, can withstand scrutiny in light of what actually occurred in the New Jersey courts.

Initially, Respondents make much of the fact that the takings issue was not raised in the original Complaint and Amended Complaint filed in this action in June 1986 and February 1987 respectively. At the time the Complaint and Amended Complaint

were filed, however, and, indeed, at the time that the trial court rendered its first decision declaring the covenant at issue unenforceable, on the grounds that the covenant did not "touch and concern" the land as a matter of state property law, the C-Town had not opened for business at all, and there had, therefore, been no taking of Petitioner's covenant. The original determinations of the trial court and Appellate Division, moreover, were purportedly based solely upon peculiar issues of state law governing the enforceability of restrictive covenants as against subsequent purchasers, without any suggestion that such covenants, if otherwise enforceable as a matter of state property law, could nevertheless be disregarded by the state courts solely because they interfered with the supposed public interest in utilizing the restricted premises for the restricted purpose. Rather, as was demonstrated in the Petition, the law of the State of New Jersey was and (at least theoretically) still is directly to the contrary, and requires condemnation where governmental agencies seek to utilize restricted property in a manner that would otherwise be prohibited. See Petition, at pages 21-22.

Accordingly, until this case reached the New Jersey Supreme Court the first time, no takings issue existed. The lower courts had simply framed the issue of enforceability by reference to state property law concepts having nothing whatsoever to do with the particular benefit to the public of the use in question, and state law appeared clear that if the Supreme Court of New Jersey determined that the covenants did "touch and concern" the burdened property, and otherwise met the traditional state law tests of reasonableness in terms of duration and area, the covenant would be enforceable. State law also clearly provided that such an enforceable covenant could not be taken by the City, or Housing Authority, merely because a supermarket represented a benefit to the public, without compensation, any more than a covenant restricting the use of a parcel of land so as to preclude a public library could be taken without compensation. See Township of Millburn v. Pitt, 68 N.J. 424, 346 A. 2d 601 (1975).

Not until the New Jersey Supreme Court rendered its decision in this matter on July 26, 1990, did the possibility of an uncompensated taking, in violation of the state and federal constitutions, arise. In that decision, the Supreme Court flatly rejected the state property law theories relied upon by the lower courts, and squarely stated that

a covenant such as the present one did satisfy the "touch and concern" requirement. Pet. App. 47a to 49a. The New Jersey Supreme Court instead stated the test for enforceability of the covenant to be "reasonableness" and also set forth, as one of the factors to be considered, "whether the covenant interferes with the public interest." Pet. App. 45a. This is not a test which had previously been utilized by New Jersey courts, and, indeed, the New Jersey Supreme Court did not cite any New Jersey cases as authority, but rather, relied solely upon an Illinois case which dealt with the traditional issue of whether the covenant imposed an unreasonable restraint on trade, or secured a monopoly for the covenantor. Pet. App. 45a (citing Natural Prods. Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N.E. 840 (1923)). The Supreme Court then stated, vaguely, that defendants had claimed that "due to the circumstances of the neighborhood and more particularly the circumstances of the people of the neighborhood, plaintiff's covenant interferes with the public's interest," and that a remand was therefore necessary for further factual findings. Pet. App. 48a to 49a.

Justice Pollock's concurring opinion recognized the serious takings issue presented by the majority opinion. Thus, Justice Pollock stated that "[n]otions of `changed circumstances' and the `public interest' thinly veil the Authority's attempt to avoid compensating Davidson for the cost of the lost benefit of an otherwise-enforceable covenant," and wondered "whether the majority would so readily condone the Authority's taking of Davidson's property if the interest taken were one in fee simple and not a restrictive covenant," concluding that it "is wrong to take Davidson's covenant without compensation just as it would be wrong to take its fee interest without paying for it." Pet. App. 64a to 65a. Justice Pollock also discussed, with specificity, the appropriateness of condemnation and eminent domain as a remedy to be utilized by the Authority, and suggested that in order to avoid wasting judicial resources and the imposition of undue costs, Davidson Bros. should simply be awarded damages for breach of the covenant. Pet. App. 68a to 69a.

As the citations contained in the Petition made clear, Petitioner made repeated references to Justice Pollock's concurring opinion in its briefs to the trial court and Appellate Division, and consistently urged that it was improper for the covenant to be "taken" without compensation solely because of the asserted public benefit that a

supermarket at this location would represent. See references in Petition at pages 8-9, 15-16. In light of this record, as well as Justice Pollock's concurring opinion, the suggestion by Respondents that Petitioner presented this matter simply as a claim for money damages arising out of the breach of a contract, and ignored any takings issue, is, to say the least, disingenuous.[1]

It is also noteworthy that while the trial court opinion, following remand, at least purported to take into account certain factors traditionally relating to the enforceability of restrictive covenants as a matter of state property law, such as the finding that the restrictive covenant was unreasonable in its duration, or constituted a restraint on trade (Pet. App. 30a), the Appellate Division decision which is the subject of the present Petition makes no such pretense. Rather, the Appellate Division affirmed the trial court opinion solely "on the ground that the covenant was so contrary to public policy that it should not be recognized as a valid, enforceable obligation." Pet. App. 6a. Indeed, the Appellate Division decision abandoned virtually all established jurisprudence in the State of New Jersey, as well as the nation at large, and treated the restrictive covenant as if it were not an interest in property at all, but simply a "contract". Pet. App. 11a, 13a to 14a.

It is, then, the Appellate Division decision which squarely frames the issue of federal constitutional significance which should be resolved by this Court. Unlike all of the prior decisions in this case, the Appellate Division did not even purport to rest its decision on some factor or factors which, as a matter of state law, would have rendered the covenant unenforceable. Rather, the Appellate Division rested its entire determination on the theory that a restrictive covenant which the New Jersey Supreme Court had already found satisfied all of the traditional "touch and concern" tests, and which,

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[1]Certainly the takings issue was raised with far more clarity and precision here than in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), where this Court was able to find only one reference anywhere in the record below to the "Federal counterpart" of the pertinent provisions of the Florida Constitution, but nevertheless found a sufficient basis for consideration of the federal issue in light of general references to "due process," and to a "taking without due process of law." 449 U.S. at 159 n.5.

therefore, constituted a fully enforceable private property right, was nevertheless not a private property right at all because a public purpose would be served by the restricted use. Clearly, then, there is no escaping the fact that the Appellate Division decision amounts to express authorization for the naked taking of a private property interest for public use, without compensation, without any purported basis in state property law whatsoever other than existence of the public use itself.

It is respectfully submitted that this Court has not been so vigilant in precluding uncompensated takings in order to provide state courts with a means for allowing governmental agencies to avoid paying compensation when private property rights are taken by mere semantics. The issue here is not one of state property law at all, since, as Petitioner has previously demonstrated, and as Respondents have nowhere disputed, applicable state property law has always recognized that restrictive covenants which impeded some valid public purpose were not void for that reason, and that the public use could not proceed in the face of such a covenant without condemnation. If state courts are nevertheless given free rein to determine, in any case, that a private property right which has always been recognized as a matter of state law suddenly ceases to be a private property right at all because it "unreasonably" interferes with the very public purpose that would have justified condemnation, there will be nothing left to the takings clause at all.

An uncompensated taking is unconstitutional regardless of whatever tricks of labelling might be utilized by state courts. Where state courts have recognized private property interests specifically, and have held those interests subject to condemnation, the taking of those interests without compensation cannot be justified by the ruse of abruptly determining that those same interests no longer exist as a matter of "state law," and the refusal of state courts to enforce such covenants, on such a basis, in and of itself constitutes impermissible state action. Compare Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). Here, the only basis in "state law" which the Appellate Division asserted as a basis for declaring the covenant at issue not to constitute a private property interest was the very "public purpose" necessary to justify condemnation, rather

than to excuse it entirely. The issue is a significant one which should be addressed by this Court. Petitioner therefore respectfully requests that the present petition for certiorari be granted.

Respectfully submitted,

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